to enter the premises, the plaintiffs may then bring it to the notice of the court. Should it be proved that the refusal was unreasonable, appropriate action might be taken against the first defendant, even to the extent of committing him. By the order, the first defendant is put in peril if he chooses to refuse permission and such refusal would also occasion adverse inferences being drawn against him.

Since I was satisfied that the plaintiffs had proved a strong *prima facie* case against the first defendant that he held the said land in trust for the plaintiffs, that there was indeed a serious danger of the first defendant destroying the Trust Deed and files relating to the said land and that the first defendant was in possession of such Trust Deed and files, I issued the order accordingly.

Application allowed.

Solicitors: *Skrine & Co.*

KOK EK CHOOI v. CHEAH SOON NEOH & ANOR.

[O.C.J. (Arulanandom J.) March 13, 1978; May 3 & November 8, 1979; January 7 & April 10, 1980; June 2 & August 24, 1981]

[Penang — Civil Suit No. 787 of 1976]

Contract — Specific performance — Claim to enforce subdivision of land.

Statute of Frauds — Memorandum in writing — Collateral oral agreements admissible to construe memorandum — Statute of Frauds 1677, s. 4 (U.K.) — Law of Property Act, 1925, s. 40(1).

The plaintiff claimed for specific performance of an agreement made between the plaintiff and the defendants on June 11, 1956 for the transfer of the defendants' two-eighths undivided shares in Lots 1285, 1286, 1288 and 1290, Mukim 14, Province Wellesley Central, to the plaintiff in consideration of the plaintiff's undertaking to surrender his six-eighths undivided shares in Lots No. 1287 and 1289 to the defendants absolutely. The agreement was that the plaintiff was to pay for and own three-fourths of the land and the defendants were to jointly own one-fourth of the land. At first the land was worked jointly but as the arrangement was not satisfactory it was decided to sub-divide the land. The object and purpose of this subdivision was in order that each party could become sole proprietor of his share of the land originally purchased, go into possession immediately and plant and develop his land and reap the harvest . It was agreed between the parties that once subdivision was completed and new titles were issued the parties would sign the necessary cross transfer of their respective undivided portions to regularize their sole proprietorship.

The defendants averred that the sole purpose of subdivision was for the purpose of cultivation and that each party was to retain his undivided interest in the different portions of the land even after subdivision and the issue of new titles. In their amended defence, they invoked section 4 of the Statute of Frauds.

Held, allowing the plaintiff's claim: (1) the parties decided to subdivide the land to get sole ownership of their portions according to their undivided shares. Subdivision was not solely for the purpose of cultivation for if it were so they would have had to share the costs and expenses of developing the separate portion and share the profits in the proportion of their undivided shares. To put any other construction on the signing on the plans and all the surrounding circumstances would be to indulge in ostrichism;

(2) collateral oral agreements have been admitted to explain and construe the note or memorandum; Even if it is not sufficient to meet the requirement by Statute that the agreement must be evidenced in writing, the fact that the plaintiff had partly performed the contract in the expectation that the defendant would perform the rest of the contract provides an equitable remedy for the plaintiff and would not enable the defendant to escape from the obligations of his contract upon the strength of the statute but the court will order specific performance of the contract;

(3) no court will allow the Statute of Frauds to be used as an instrument of fraud. Hence the Statute of Frauds will be of no avail to the defence.

Cases referred to:-

(1) *Jacobs* v. *Revell* [1900] 2 Ch. 858.

(2) *In re Puckett & Smith's Contract* [1902] 2 Ch. 258.

CIVIL SUIT.

Lim Kim Chuan for the plaintiff.

S. Thillaimuthu (*Lim Teong Chuan* with him) for the defendants.

Arulanandom J.: This was a claim by the plaintiff for specific performance of an agreement made between the plaintiff and the defendants on or about June 11, 1956 for the transfer of the defendants' two-eighths undivided shares in Lots 1285, 1286, 1288 and 1290, Mukim 14, Province Wellesley Central, to the plaintiff in consideration of the plaintiff's undertaking to surrender his six-eighths undivided shares in Lots No. 1287 and 1289 to the defendants absolutely.

The defendants denied that there was any such agreement and although the counterclaim was withdrawn at the trial, the defendants in their pleadings by way of counterclaim alleged that the plaintiff had since the year 1973 unjustly kept the income and profits from the portions of the said land cultivated by him and had failed to distribute to the defendants their fair share of the same. Wherefore they counterclaimed for:—

(i) an Order that the plaintiff do render true and proper accounts of all the incomes and profits from the land bearing Lots Nos. 1285, 1286, 1288 and 1289, Mukim 14 Province Wellesley Central since the year 1973, and

(ii) an Order that the plaintiff pay to the defendants two-eighths share of the total income and profits so found to be due from the said lots.

At the commencement of the hearing on November 8, 1979 the defendants applied to amend the defence by the addition of paragraph 12A:

"There is no or sufficient memorandum in writing of the alleged agreement and the defendant will rely on section 4 of the Statute of Frauds."

As plaintiff's counsel had no objections the amendment was allowed.

The brief history of the matter is as follows: Some time in December 1955 the plaintiff and the defendants (who were husband and wife) who knew each other well together purchased Lot No. 616(3) Mukim 14 Province Wellesley Central at $530 per acre. The agreement was that plaintiff was to pay for and own three-fourths of the land and defendants were to jointly own one-fourth of the land. This is admitted.

At first the land was worked jointly but as, according to the defendants' son, the arrangement was

not satisfactory it was decided to sub-divide the land. To this end a survey was done and a plan drawn up subdividing the land into four portions marked A, B, C and D, each being one quarter of the whole land. Parties were to draw lots for their portions. But as the value of the four portions were not equal because of the nature of cultivation, it was decided that the one who drew the more valuable lot had to compensate the other with cash. The amount of compensation was fixed and marked on the plan. The person who drew Lot D had to pay $250 as compensation to the other, the person who drew Lot A had to pay $450, and the person who drew Lot B had to pay $600. These sums were to be paid to the person who had Lot C. All this was done in the office of a lawyer Ong Huck Lim (now deceased) who wrote the amounts of compensation on the respective portions in the plan. In the event the defendants drew portion D and in accordance with the agreement paid $250 to the plaintiff. The object and purpose of this subdivision was in order that each party could become sole proprietor of his share of the land originally purchased, go into possession immediately and plant and develop his land and reap the harvest. After the lots were drawn each party signed his name on the lot which was to belong to the plaintiff or defendants respectively. The defendants signed on Lot D and the plaintiff on the others (The plan was tendered and marked P2 at the trial).

In accordance with the agreement the parties went into possession of their respective portions and each one surrendered all claim on the portion or portions allotted to the other.

The plaintiff for his part felled all the trees on his land which was part rubber and part jungle and planted it with oil palm which he is still doing. There was no question of rendering accounts or sharing expenses or profits with the defendants. The defendants on their part planted their portion with rubber. It was agreed between the parties that once subdivision was completed and new titles were issued the parties would sign the necessary cross transfers of their respective undivided portions to regularize their sole proprietorship.

The defendants now contend that the plaintiff's version of the purpose of subdivision is not correct. They aver that the sole purpose of subdivision was for the purpose of cultivation and that each party was to retain his undivided interest in the different portions of the land even after subdivision and the issue of new titles.

The vital question to be answered before one can adjudicate is whether the purpose of subdivision of the land into the respective shares of the parties was for the purpose only of cultivation as the defendants allege or for the purpose of giving distinct and sole ownerships to the parties of their respective portions of the land. From the point of view of the defendants the other issue to be considered before specific performance could be ordered was the fact that the defendants, even if they agreed to subdivide the land for the purpose of having separate ownership, did not receive the portion of land they expected to receive because of Government acquisition of part of the land as a canal reserve. To my mind the acquisition of part of the land by Government does not affect the original agreement. The acquisition by Government of the portion of land was not in the contemplation of either party, nor was the plaintiff in any way responsible for dimunition of the defendants' portion. By the acquisition the plaintiff himself lost a portion of his land, and therefore a compulsory acquisition by Government which no party could prevent or interfere with could have no bearing on the rights and obligations between two parties to an agreement between them. The cases of *Jacobs* v. *Revell*[1] and *In re Puckett & Smith's Contract*[2] which were cited to me in support of the proposition that a purchaser had a right to rescind a contract when what he agreed to purchase was not the same as what he received had no relevance to this case as these were cases where it was the vendor who was guilty of misdescription of the title as a result of which the purchaser was misled and did not get what he expected to get.

Counsel for defendants also vehemently opposed the consideration of oral evidence regarding the terms of the agreement to subdivide as the plaintiff was relying on the plan as a note or memorandum in writing as evidence of the contract and no separate oral agreement had been pleaded. I see no merit in this argument. The oral agreement is a collateral agreement and necessary to construe and explain the meaning of P2, the plan submitted in evidence. The markings on the plan evidently have significance when considered in the background of the plaintiff and defendants having unequal undivided shares in the said land.

Furthermore the plaintiff's only witness Abdul Rahim Darus who was working for Haji Ismail bin Hassan the person who prepared the plan P2 stated that he was the one who accompanied Haji Ismail to the land and measured it. He stated on oath:

"It (the plan) shows land being divided into four portions, A, B, C & D. I measured the land and showed the parties their four portions.... The portions were marked by posts. ... The plan was drawn because they wanted to ascertain their own portions."

And on cross-examination he said:

"The defendants speak a little bit of Malay. I did see them on the land. They spoke to me. The land is large. I only showed them the boundaries. The second defendant told me he has bought portion D."

Again, defendants' son DW1 stated in evidence that they decided to subdivide because there'll be less trouble and that plaintiff and the defendants did not share the costs or produce of each other's portions of the land. And further the first defendant herself says that she collected the produce on her own portion and they were not entitled to the profits from the plaintiff's land.

Again in the statement of defence in paragraphs 3 and 4 the defendants state that they signed the plan marked K1 annexed to the statement of claim purely for the purpose of replanting crops and to facilitate the obtaining of replanting grant but in the letter of June 30, 1976 written by their solicitor (p20 of Agreed Bundle) it is admitted that it was for subdivision, which is what the plaintiff alleges.

Considering all the evidence the only conclusion, and the only logical one, that the court can come to is that the parties decided to subdivide the land to

get sole ownerships of their portions according to their undivided shares. Subdivision was not solely for the purpose of cultivation for if it were so they would have had to share the costs and expenses of developing the separate portions and shared the profits in the proportion of their undivided shares. To put any other construction on the signing on the plans and all the surrounding circumstances would be to indulge in ostrichism. That the parties understood the full import of signing the Plan K1 in the portions allotted to them, where the compensation to be paid by the allottees of the several portions is marked, the significance of signing the Plan P2 for subdivision, and then being taken to the land and shown where their respective portions were by PW2, then entering into possession of their portions and cultivating their respective portions individually without recourse to each other and without sharing the expenses incurred, and then not expecting or making demands for share of profits from each other, all indicate very clearly that all the ingredients of a binding contract were contained in the Plan signed by the parties.

The defendant, at the trial amended his defence to include a plea under section 4 of the Statute of Frauds which has been re-enacted by section 40(1) of the Law of Property Act 1925. The section reads:

"No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged, or by some other person thereunto by him lawfully authorised."

The law does not specify the matters which the note or memorandum must contain. This has been left to judicial interpretation. The courts have held that the note or memorandum need not be prepared as such. Collateral oral agreements have been admitted to explain and construe the note or memorandum. The plan K1 signed by the parties which was later sent for subdivision is sufficient to bind the parties. Furthermore even if it is not sufficient to meet the requirement by Statute that the agreement must be evidenced in writing, the fact that the plaintiff has partly performed the contract in the expectation that the defendant would perform the rest of the contract provides an equitable remedy for the plaintiff and would not enable the defendant to escape from the obligations of his contract upon the strength of the Statute but the court will order specific performance of the contract. It has long been established that no court will allow the Statute of Frauds to be used as an instrument of Fraud. Hence the defence of non-compliance with the Statute of Frauds will be of no avail to the defence.

The only thing remaining to be done in the transaction between the plaintiff and the defendants is for them to sign cross transfers of their undivided shares in the respective new titles to land.

The Order of the court will therefore be:

(1) The defendants execute valid and registrable transfers of their two-eighths undivided shares in Lots No. 1285, 1286, 1288 and 1290 Mukim 14 Province Wellesley Central to the plaintiff. In the event of their failing to do so within one month of this day, the Senior Assistant Registrar do execute the said necessary transfer.

(2) That the plaintiff execute valid and registrable transfer of his six-eighths undivided shares in Lots No. 1287 and 1289 Mukim 14, Province Wellesley Central to the defendants. In the event of his failing to do so within one month of this date, the Senior Assistant Registrar do execute the said necessary transfer.

(3) Costs to be paid by the defendants to the plaintiff.

Order accordingly.

Solicitors: *Allen & Gledhill; Lim Teong Chuan.*

PUBLIC PROSECUTOR v. MAT RADI

[A.Cr.J. (Tan Chiaw Thong J.) September 1, 1981]
[Kuching — Criminal Appeal No. KG. 2 of 1981]

Criminal Law and Procedure — Corruption involving personnel of Armed Forces and Police Force — Who may prosecute — Lower court ordering discharge of accused — Criminal Procedure Code, ss. 376(i) & 377 — Federal Constitution, art. 144(3) — Prevention of Corruption Act, 1961, s. 4(b).

The prosecution appealed against the Order of the lower court discharging the accused on a charge under section 4(b) of the Prevention of Corruption Act 1961. The learned trial magistrate had repeatedly expressed the view that a Deputy Public Prosecutor should appear to conduct the prosecution. The Deputy Public Prosecutor informed the court that the matter had been considered by his predecessor and himself and it was decided that the prosecution should be conducted by a police officer. The learned magistrate expressed the view that as this particular corruption case involved personnel of the Armed Forces and Police Force, a Deputy Public Prosecutor rather than a police officer should conduct the prosecution. He concluded that since the Public Prosecutor was not interested the court had no alternative but to discharge the accused.

The question for the appellate court was whether for the reasons given by him the order of discharge made by the learned trial magistrate was supportable in law.

Held, allowing the appeal and setting aside the order of discharge: (1) the reason recorded by the learned trial magistrate for discharging the accused was not because he considered the charge to be groundless but because a Deputy Public Prosecutor had not appeared before him to conduct the prosecution. There was therefore no legal ground for making the order of discharge;

(2) whether in any particular case there should be a prosecution or whether an accused should be further prosecuted is a matter for the Public Prosecutor and it is not the function of the court to decide on the matter.

Cases referred to:-

(1) *Public Prosecutor* v. *Hettiarachigae L.S. Perera* [1977] 1 M.L.J. 12, 13.

(2) *Andrew Lai Siat* v. *Public Prosecutor* Criminal Appeal No. K18 of 1974 *(unreported).*

(3) *Public Prosecutor* v. *Karumah* [1980] 2 M.L.J. 102.

MAGISTRATE'S APPEAL.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the appellant.

Chan Khoon Ted for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Public Prosecutor against the Order of the lower court discharging the accused on a charge under section 4(b) and punishable under section 4 of the Pre-